# upreme Court of the United States

October Term, 1951.

No. 9.

DONALD R. DOREMUS and ANNA E. KLEIN,
*Appellants,*

vs.

OARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND THE STATE OF NEW JERSEY,
*Respondents.*

peal from the Supreme Court of the State of New Jersey.

## IEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

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# SUPREME COURT OF THE UNITED STATES.

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DONALD R. DOREMUS AND ANNA E. KLEIN,
*Appellants,*

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND THE STATE OF NEW JERSEY,
*Respondents.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

## BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

This brief is filed with the consent of the parties.

## INTEREST OF AMICUS CURIAE.

The State Council of the Junior Order of United American Mechanics of the State of New Jersey is a fraternal patriotic order, and was incorporated in the year 1875. It has approximately 20,000 members throughout the State of New Jersey, and is affiliated with similar fraternal patriotic orders in other states. One of its objects, as stated in its State Council Constitution, is to foster the public school system, "to prevent sectarian interference therewith, and uphold the reading of the Holy Bible therein." Throughout its long history, it has taken a keen interest in all matters pertaining to the public schools and has actively supported legislation and various movements conducive to the improvement of the public schools. It is not a labor organization, as was supposed by the late Mr. Justice Rutledge in the case of *Everson v. Board of Education.*[1] Its members are "mechanics" in the same sense that members of the Masonic Order are "masons."

It believes in the historic, basic American principle of separation of church and state, and that only by its steadfast observance can the religious freedom of all the people be assured, but it believes that the reading of the Bible and reciting of the Lord's Prayer in the opening exercises of the public schools is not a violation of that principle. A brief amicus curiae was filed by it in the *Everson case,* and the writer of this brief was counsel for Mr. Everson in the New Jersey Court of Errors and Appeals,[2] and was associated with counsel for Mr. Everson in this Court. We there urged that transportation of children to sectarian schools, at

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[1] 330 U. S. 1, 54; note 47.

[2] 133 N. J. L. 350, 44 A. 2d 333.

public expense, was a violation of the principle of separation of church and state and the "establishment of religion" clause of the First Amendment. We disclaim, however, any desire in that case to advance the proposition that the First Amendment prohibits all relation between religion and state. On the contrary, we believe that government recognition of God as the author of our liberties and all the principles of morality has been one of the greatest factors contributing to our national unity. For that reason we feel impelled to oppose the attack made in this case upon Bible reading in the public schools, which, as Mr. George E. Reed[3] says in an article in the February 1950 issue of Catholic Action, "from the very inception of this Country has been an integral part of our school system." Our opposition to appellants' views is not motivated in any way by hostility to any person because of his religious beliefs or disbeliefs, but by a firm conviction that the reading of the Bible and the repeating of the Lord's Prayer in the opening exercises of the public schools is in accordance with the Judaeo-Christian concept of the relation of man to God and of man to man, which is the very essence of American Democracy.

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## OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey (R. 22-38) is reported in 5 N. J. 435, 75 A. 2d 880. It affirmed a decision of the Superior Court of New Jersey, Law Division, whose opinion (R. 7-16) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

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[3] Member of the legal staff of National Council of Catholic Men and National Council of Catholic Women.

## STATEMENT OF THE CASE.

The appellant Donald R. Doremus, as a taxpayer, and the appellant Anna E. Klein, as a taxpayer and as the mother of a child attending one of the public schools conducted by the Appellee Board of Education, filed suit in the Superior Court of New Jersey, Law Division, to enjoin the reading of the Bible and the repeating of the Lord's Prayer in the public schools (R. 1, 5). It was stipulated that a directive issued by the Appellee Board of Education provides that "any student may be excused during reading of the Bible upon request," and that in the present case neither Appellant Klein nor her child made a request that the child be excused (R. 5). Unsuccessful in the State Superior Court (R. 6-20) and in the State Supreme Court (R. 21-38), appellants obtained an order by Mr. Justice Burton allowing an appeal to the Supreme Court of the United States (R. 38-39). Thereafter, on March 12, 1951, this Court made an order postponing to the hearing on the merits further consideration of the question of jurisdiction and of appellees' motion to dismiss or affirm (R. 43).

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## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The purpose of appellants' suit is to test the constitutionality of two sections of the Revised Statutes of New Jersey (1937).

R. S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read,

or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

These statutes are attacked as violative of the First and Fourteenth Amendments to the United States Constitution, which provide in part:

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

Fourteenth Amendment

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *."

## QUESTION PRESENTED.

The question presented in this case, and to which this brief is addressed, is the validity under the First and Fourteenth Amendments to the Constitution of the United States of two New Jersey statutes, R. S. 18:14-77, which directs the reading of at least five verses from that portion of the Bible known as the Old Testament, without comment, in the opening exercises of the public schools, and R. S. 18:14-78, which permits the repeating of the Lord's Prayer in such opening exercises.

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## SUMMARY OF ARGUMENT.

### I.

The First Amendment is the political expression of a religious concept and does not disestablish government promulgation of non-sectarian religion.

### II.

The Virginia Bill for Religious Liberty did not disestablish state promulgation of non-sectarian religion.

III.

The proceedings of the First Congress display an intent that government promulgation of non-sectarian religion should not be disestablished by the First Amendment.

IV.

The First Amendment and the principle of separation of church and state have never been construed to require disestablishment of all relations between government and religion.

V.

The First Amendment, as made applicable to the states by the Fourteenth Amendment, does not disestablish Bible Reading and the repeating of the Lord's Prayer in the public schools.

VI.

Appellants' rights of conscience or freedom of intellect have not been infringed.

## ARGUMENT.

### Point I.

**The first amendment is the political expression of a religious concept and does not disestablish government promulgation of non-sectarian religion.**

"We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator**, with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[4]

"Can the liberties of a nation be thought secure when we have removed *their only firm basis*, a conviction in the minds of the people that these liberties are of the gift of God?"[5]

"When we assemble together, fellow citizens, to consider the state of our beloved country, our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty."[6]

"In conformity with the principles of our Constitution, which places all sects of religion on an equal footing, * * * we have proposed no professor of divinity; and the rather as the proofs of the being of a God, the

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* All italics ours unless otherwise indicated.

[4] Declaration of Independence.

[5] Padover, The Complete Jefferson, p. 677.

[6] Jefferson's second message to Congress. Id., 394. "I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, * * * and to whose goodness I ask you to join with me in supplications * * *." Jefferson's Second Inaugural Address. Id., p. 414.

creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; * * * a basis will be formed common to all sects. Proceeding thus far *without offense to the Constitution*, we have thought it proper at this point to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets."[7]

We cannot believe that the great author of those words would have joined in appellants' contention that the reading of the Bible and the repeating of the Lord's Prayer in the opening exercises of the public schools "are such an intermingling of religion and government as are clearly repugnant to the First and Fourteenth Amendments of the United States Constitution."[8]

While "the clear extremes represented by political clerics and robed politicians"[9] do not provide a safe guide to a determination of the limits of government promulgation of religion, we cannot, like Descartes, "shut up alone in a stove," eliminate from our minds "all tradition"—all that has come down to us from the past—and hope to resolve the question with "the absolute precision of mathematics," which furnishes "an exacting standard for truth which no generally accepted facts of nature or history could fully meet."[10]

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[7] Jefferson's statement relative to the tax-supported University of Virginia. Id., 1104.

[8] Appellants' brief, p. 6.

[9] University of Pennsylvania Law Review (Dec., 1947), Vol. 95, p. 230.

[10] Henry P. Van Dusen, God in Education (New York, 1951), pp. 23, 24, 25. "Descartes assumed that every seeker after truth should begin his quest **de novo**, without reference to previous discoveries. * * * In the wider corporate scene, this is the essence of Modernism—disdain of the wisdom of the past, assumption of the authority of the latest: the cult of contemporaneity." Id., pp. 29, 30.

The authors of the First Amendment did not intend to abrogate all relations between religion and government. It was not designed by rationalists to break the hold which religion had upon the hearts and minds of men, or to disestablish government recognition of belief in God, as the Creator, preserver, and supreme ruler of the universe, the author of all the relations of morality and of the laws and obligations these infer,[11] and as the author of our liberties.[12]

An understanding of the historical foundations of our religious freedom leads inevitably to the conclusion that the guarantees of religious liberty contained in the First Amendment are not merely the expression of a political

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[11] See note 7. "The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; * * * these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them. * * * This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience." Joseph Story, Commentaries on the Constitution of the United States (5th edition, 1833), Vol. 2, p. 628. "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created uniform disapprobation, if not universal indignation." Id., p. 631 (citing 2 Lloyd's Debates, 195, 196). "It was never intended by the Constitution that the Government should be prohibited from recognizing religion—where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects." Cooley's principles of Constitutional Law (3d edition, 1898), pp. 224, 225.

[12] See notes 4 and 5. The inscription on the Liberty Bell is taken from the Bible: "Proclaim liberty throughout the land unto all the inhabitants thereof." Leviticus 25:10. The Psalmist said to God: "I will walk at liberty; for I will seek thy precepts." Psalms 119:45. The Founder of Christianity added: "Ye shall know the truth, and the truth shall make you free." John 8.32. A verse in one of St. Peter's Epistles sums up the teaching of the Bible relative to liberty: "Live like free men, only do not make your freedom a pretext for misconduct; live like servants of God." 1 Peter 2:16 (Moffatt translation). It is significant that a thoughtful publicist with a Jewish background, Walter Lippmann, "identified in the public mind with the point of view of reverent agnosticism" (Anson Phelps Stokes, Church and State in the United States—New York, 1950—Vol. III, p. 591) emphasizes the fact that freedom has a spiritual basis: "For in the recognition that there is in each man a final essence—that is to say, an immortal soul—which only God can judge, a limit was set upon the dominion of men over men. * * * Upon this rock they have built the rude foundations of the Good Society." Walter Lippmann, The Good Society (1937), p. 378.

conviction of the founding fathers but a religious concept as well,[13] but it is not a sectarian concept. It is interesting to note, however, that one of the law review writers has expressed the thought, with a great deal of confidence in his conclusion, that the First Amendment pronounces a Protes-

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[13] Walter Lippmann has reached that conclusion: "What separates us from the totalitarian regimes is our belief that man does not belong to the state. * * * They said that man belonged to his Creator, and that since he was, therefore, an immortal soul, he possessed inalienable rights as a person which no power on earth had the right to violate * * *. The liberties we talk about defending today were established by men who took their conception of man from the great central religious tradition of Western civilization, and the liberties we inherit can almost certainly not survive the abandonment of that tradition." N. Y. Herald-Tribune, Dec. 17, 1938; Stokes, Vol. III, p. 706. "Thus, working upon the minds of men for two thousand years, the Judaeo-Christian revelation in due time brought forth the political philosophy of democracy * * *. Freedom, as we know it, is the political projection of a religious idea founded in faith in the fatherhood of God and brotherhood of man. Without that faith it has neither foundation nor sustenance. Liberty cannot survive in a world of cynicism." Sermon on Religion and Democracy, issued by the office of Civilian Defense, Nov. 3, 1941; N. Y. Times, Nov. 9, 1941; Stokes, Vol. III, pp. 893, 894. Wendell Wilkie said: "They did not begin with Life, Liberty and the Pursuit of Happiness and work their way back to God. They began with God. Life, Liberty and the Pursuit of Happiness, were, to them, inalienable human rights, because of that starting place." Stokes, Vol. III, p. 701. "Thus from our earliest recorded history, Americans have thanked God for their blessings. In our deepest natures, in our very souls, we, like all mankind since the earliest origin of mankind, turn to God in time of trouble and in time of happiness. 'In God We Trust'." The late President Franklin D. Roosevelt's 1938 Thanksgiving Day Proclamation, New York Times, Nov. 20, 1938; Stokes, Vol. III, p. 190. The connection between democracy and the Jewish-Christian tradition has been emphasized by the Rabbinical Assembly: "Only a democratic form of government is consistent both with Jewish religious evaluation of the dignity of the human soul and with its affirmation of the brotherhood of all men." Stokes, Vol. III, p. 699.

There are "principles of abstract justice, which the Creator of things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree the rights of civilized nations." Johnson and Graham's **Lessee v. McIntosh** (1823), 8 Wheaton (U. S.) 543, 572 (Opinion by Chief Justice Marshall).

"We are a Christian people * * * according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." **United States v. MacIntosh** (1931), 283 U. S. 605, 625. "One cannot speak of religious liberty, with proper appreciation of its essential and historical significance, without assuming the existence of a belief in supreme allegiance to the will of God." Id., pp. 633, 634 (dissenting opinion of the late Chief Justice Hughes, concurred in by Justices Holmes, Brandeis and Stone). The American organic utterances "speak the voice of the entire people" and "affirm and reaffirm that this is a religious nation." **Church of the Holy Trinity v. United States** (1892), 143 U. S. 457, 470.

tant concept or belief and has "preserved that belief as a living part of our constitutional heritage."[14] Another writer emphatically states that the First Amendment is not based upon any sectarian concept, not even James Madison's sectarian concept, and that Madison's total concept with respect to the relation between government and religion was a sectarian concept and "could not have been poured into the First Amendment in 1791, and by the same token it cannot be now."[15]

If some of Madison's writings late in life are to be regarded as expressing his total concept of the relation between government and religion, it may well be doubted that it was poured into the First Amendment. Long after he left the Presidency he expressed himself, in his essay on Monopolies,[16] as opposed to exemption of houses of worship from taxation, incorporation of ecclesiastical bodies with the capacity of acquiring property.[17] Thanksgiving day procla-

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[14] Harvard Law Review, Vol. 64, pp. 172-175. Mr. Justice Jackson, in his dissenting opinion in the **Everson** case (1947), says: "Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values." 330 U. S. 1, 23. His concurring opinion in the **McCollum** case (1948), 333 U. S. 203, 232, definitely indicates, however, that he does not agree with the writers who believe that, while the Protestant concept so completely predominated in the public schools during the early part of the eighteenth century that instruction in the schools included Protestant sectarianism, the twentieth century version of that concept requires absolute and complete secularism in the schools to the exclusion of all religion.

[15] One of eight articles on Religion and the State published in Law and Contemporary Problems, Duke University Law School (1949), Vol. 14, No. 1, p. 23, at pp. 28-32. "And if there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land." Id., p. 30.

[16] Fleet, Madison's Detached Memoranda, 3 William and Mary Quarterly (1946), pp. 534, 558.

[17] This Court has said: "While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations." **Terrett v. Taylor** (1815), 9 Cranch 43, 49 (U. S.).

mations, and chaplains in Congress and the army and navy. The whole course of action pursued by our Presidents (including Madison) and the Congress show conclusively that his views regarding those things have been rejected as a proper interpretation of the First Amendment.

Madison in his Memorial and Remonstrance said: "Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any *Sect*, nor suffering any *Sect* to invade those of another."[18]

Later he was very much concerned about the attempt "to insert the words 'Jesus Christ' after the words 'Our Lord' in the preamble" of the Virginia Bill For Religious Liberty, "the object of which," he said "would have been to imply a restriction of the liberty defined in the Bill to those professing his religion only."[19] It is significant that he expressed no concern whatever about the implications arising

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[18] Appendix to **Everson v. Bd. of Ed.**, 330 U. S. 1, 63. When he said that "Religion is wholly exempt from its (Civil Society's) cognizance," in his Memorial and Remonstrance (par. 1), he was referring to dogmatic (sectarian) religion. This is evident from the fact that the Memorial and Remonstrance was directed against a bill providing state support of sectarian religion, i.e., all the sects of the Christian religion. It was a "Bill establishing a provision for Teachers of the Christian Religion." His whole concept of the relation between government and religion is based upon the premise that "before any man can be considered as a member of civil society, he must be considered as a subject of the Governor of the Universe," and he defines "religion" as the "duty which we owe to our Creator" (Par. 1). The Memorial is directed against "the establishment proposed" (Par. 6, 9); "the establishment in question" (Par. 8); establishment of "Christianity, in exclusion of all other religions" (Par. 3); i.e., in exclusion of Jews and other non-Christians who believe in the Creator; establishment of "any particular sect of Christians" (Par. 3); "ecclesiastical establishments" (Par. 7, 8); and "established clergy" (Par. 8). He could not have believed that there should be separation of non-sectarian religion and State because he concludes the Memorial and Remonstrance with a prayer to the "Supreme Lawgiver of the Universe" to "guide them (members of the State Legislature) into every measure which may be worthy of his blessing."

[19] Fleet, Madison's Detached Memoranda, 3 William and Mary Quarterly, p. 556.

from the inclusion of the non-sectarian words "Almighty God" and "holy author of our religion" in that preamble.

There can be no doubt that Madison believed in "the total separation of the *Church* from the State"[20] and in "the perfect equality of rights which it secures to every religious sect."[21] To him "a perfect separation between *ecclesiastical* and civil matters" was of utmost importance.[22]

That Madison used the word "religion" to mean sectarian religion in such phrases as "separation of government and religion" or "establishment of religion" or "alliance between law and religion," is exemplified by his statement, made in 1823, that "relaxation of the alliance between law and religion" had reached its consummation in Pennsylvania, Delaware and New Jersey.[23] Those three States and all the other States, at that time and ever since, have promulgated or fostered non-sectarian religion.

Dogmatic (sectarian) religion is in its very nature a personal, private and interior matter of the individual conscience, having no relation to the public concern of the State. Between it and the State there can be no official re-

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[20] Letters and Other Writings of James Madison (Published by order of Congress, Phila., 1865), Vol. III, p. 125.

[21] Id., p. 179.

[22] Id., p. 275. "The peculiarity in the institution (University of Virginia) which excited at first most attention, and some animadversion, is the omission of a theological professorship. The public opinion seems now to have sufficiently yielded to its incompatibility with a State institution, which necessarily excludes **sectarian** preferences." Id., p. 475. The University of Virginia now has on its faculty a "professor of religion". Stokes, Vol. II, p. 634.

[23] "The settled opinion here (Virginia) is, that religion is essentially distinct from civil government, and exempt from its cognizance; * * * that a legal establishment of religion without a toleration could not be thought of, and with a toleration, is no security for public quiet and harmony; but rather a source itself of discord and animosity: and, finally, that these opinions are supported by experience, which has shown that every relaxation of the alliance between law and religion, from the partial example of Holland to its **consummation** in Pennsylvania, Delaware, New Jersey, &c., has been found as safe in practice as it is sound in theory." Letters and Other Writings of James Madison, Vol. III, pp. 307, 308.

lation. The State cannot aid or foster it in any form or degree however slight. Non-dogmatic (non-sectarian) religion, however, is not and never has been a wholly private matter. It has always been the practice of our government to appeal to the "Supreme Judge of the world for the rectitude of our intentions" with respect to public transactions, and never has our government departed from "a firm reliance on the protection of Divine Providence."[24] Our children have been taught in our schools from the earliest days to the present time that our civil and religious liberties were derived from God "Who hath made and preserved us a nation."[25]

The statements that "religion and law are twin sisters,"[26] and that "in this happy country of ours religion and liberty are natural allies,"[27] and that "it is the duty of nations as well as of men to own their dependence upon the overrul-

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[24] Declaration of Independence. Jefferson, in his first inaugural address, said: "And may that Power which rules the destinies of the universe, lead our councils to what is best, and give them a favorable issue for your peace and prosperity." Padover, pp. 385 and 387. See his references to the guidance of Providence in the affairs of our country, in his second inaugural address and his first, second and third annual messages to Congress. Padover, pp. 387, 394, 404, 414. Madison, in his first inaugural address, mentions the "Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." Messages and Papers of the Presidents, Richardson (1896), Vol. I, p. 466, at 468. In his first annual message to Congress, he said: "We are indebted to that Divine Providence whose goodness has been so remarkably extended to this rising nation, it becomes us to cherish a devout gratitude, and to implore from the same omnipotent source a blessing on the consultations and measures about to be undertaken for the welfare of our beloved country." Id., p. 478.

[25] Star Spangled Banner.

[26] Works of James Wilson (Andrews ed. 1896), p. 94. "He (Wilson) spoke not simply for himself but for a sanguine generation which saw no insuperable difficulty in reconciling that proposition with the faith that the health of society would be improved were the power of churches separated from the authority of government." Harvard Law Review, Vol. 64, p. 170.

[27] Statement of Theodore Roosevelt. Stokes, Vol. I, p. xlii.

ing power of God; * * * and to recognize the sublime truth, announced in the Holy Scriptures and proved by all history, that those nations only are blessed whose God is the Lord,"[28] can be true only if a distinction is made between government promulgation of non-sectarian religion and its support of sectarian religion.

Dr. Stokes says that "probably no other historical scholar has studied the background of modern Church-State relations as thoroughly as Professor Frederich Heinrich Geffcken," who reached the conclusion that "there is no true morality without religion," that it is a vain thing to "attempt to supply by philosophy and abstract morality the want of religion," and that to "completely isolate" government from religion would be "disastrous to the nation."[29] The same thought is expressed in Washington's Farewell Address, in which he emphatically states that we cannot expect "that national morality can prevail in exclusion of religious principle," and that "morality is a necessary spring of popular government."[30]

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[28] Statement of Lincoln. Stokes, Vol. I, p. xlii. "Storms from abroad directly challenge three institutions indispensable to Americans, now as always. The first is religion. It is the source of the other two—democracy and international good faith." Speech of Franklin D. Roosevelt to Congress, N. Y. Times, Jan. 5, 1939; Stokes, Vol. III, p. 704.

[29] "* * * the State can never dispense with religion for the moral education of its subjects, since there is no true morality without religion. The example of individuals who, having broken with religious belief, still conform to morality, proves nothing to the contrary; for men, such as these, regulate their conduct, however unconsciously, by the civilization of the nation to which they belong, and which in turn is saturated with religious elements. * * * The civilization of all States alike is based, in the first instance, upon religion; and where the latter is obliterated, as during the later period of the Roman Republic, or in France under Louis XV, there discipline and moral rectitude rapidly decline; the foundations of the State itself have become rotten, and give warnings of impending ruin." Friedrich Heinrich Geffcken, Church and State—Their Relations Historically Developed (London, 1877), Vol. I, p. 14; Stokes, Vol. III, pp. 659, 660.

[30] "Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. * * * A volume could not trace all their connections with private and public felicity.

In *Everson v. Board of Education*,[31] it was held that "there is every reason to give the same application and broad interpretation to the 'establishment of religion' clause" as has been given by the Court to the free exercise of religion clause. Therefore, if the First Amendment commands that a state shall make no law prohibiting the free exercise of religion or *non-religion*,[32] it also commands that a state shall make no law respecting an establishment of religion or *non-religion* in the public schools.[33] If it commands that a state shall make no law prohibiting the free exercise of sectarian religion, it also commands that a state shall make no law respecting an establishment of sectarian religion. The

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Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? * * * Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundations of the fabric?" Washington's Farewell Address, C. R. Gaston edition, in Standard English classics. "Lastly our ancestors established their system of government on morality and religious sentiment. Moral habits, they believed, cannot safely be trusted on any other foundation than principle, nor any government be secure which is not supported by moral habits." Writings and Speeches of Daniel Webster, Vol. I, p. 200; Stokes, Vol. III, p. 703.

[31] 333 U. S. 1, 15. The dissent, agreed to by four judges said that the word "Religion," although it appears only once in the First Amendment "governs two prohibitions and governs them alike." Id., p. 32.

[32] The term "religion" cannot include non-religion or non-belief because it has "reference to one's views of his relations to his Creator." **Davis v. Beason** (1890), 133 U. S. 333, 342. It is "the duty which we owe to our Creator." Madison's Memorial and Remonstrance, Par. 1. The freedom of intellect, freedom of mind or freedom to disbelieve of the atheist, free thinker or secularist is, of course, guaranteed by the due process clause of the Fourteenth Amendment. It is upon that Amendment, not the First Amendment, that the free thinker himself bases his liberty of mind or intellect or freedom to disbelieve. "Non-religious people appeal more to the 'equal protection' clause of the Fourteenth Amendment than to the 'establishment' clause of the First." Frank Swancara, Separation of Religion and Government, pp. 51, 52.

[33] If the First Amendment prohibits all religion, including non-dogmatic (non-sectarian) religion, in the public schools, it establishes the beliefs or disbelief of the atheist, freethinker or secularist.

latter interpretation is in accord with the meaning of the word "religion."[34] The establishment of any or all sectarian religions is what was disestablished when the First Amendment forbade "an establishment of religion."[35] The First Amendment's prohibition of legislation for the support of any religious tenets, or the modes of worship of any or all sects or denominations is not disestablishment of government promulgation of the proofs of the being of a God, the Creator, preserver and supreme ruler of the universe, the author of all the relations of morality and of the laws and obligations which these infer. Any attempt to disestablish government recognition of non-sectarian belief in God would have met with the disapprobation of the authors of the First Amendment.

The First Amendment, as made applicable to the states by the Fourteenth Amendment,[36] commands that a state shall make no "law respecting an establishment of religion, or prohibiting the free exercise thereof," and there can be no doubt, in view of the *Everson* and *McCollum* cases, that it embodies the principle of separation of *church* and state. In view of those decisions, the words "establishment of religion" mean more than "merely to forbid an established church."[37]

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[34] See note 32.

[35] As early as 1890, this Court interpreted the "establishment of religion" clause "to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." **Davis v. Beason** (1890), 133 U. S. 333, 342.

[36] **Everson v. Bd. of Ed.** (1947), 330 U. S. 1, 8; **McCollum v. Bd. of Ed.** (1948), 333 U. S. 203, 210.

[37] **McCollum v. Bd. of Ed.**, 333 U. S. 203, 213. As thus interpreted and applied, the First Amendment was held to prohibit state aid "to any or all religious faiths or **sects**, in the dissemination of their doctrines" (Id., p. 211). The Court condemned, as unconstitutional, "close co-operation between the school authorities and the **religious council**"; the State's compulsory education system's assistance to and integration with "the program of religious instruction carried on by separate **religious sects**" (Id., p. 209); and "utilization of the tax-established and

In the *Everson case*, Mr. Justice Black said that "these words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." Continuing, he said that whether the New Jersey law authorizing use of public funds for transportation of children to private schools, including sectarian schools, "is one respecting an 'establishment of religion' requires an understanding of the meaning of that language," and, therefore, he deems "it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted."[38] His review of that period[39] shows that the evils which were intended to be stamped out by the First Amendment were "bondage of laws which compelled them to support and attend *government favor churches*"; "turmoil, civil strife, and persecutions, generated in large part by *established sects*";[40] "power of government supporting" *sects*. "In efforts to force loyalty to whatever *religious group* happened to be on top and *in league with the government* of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." Those punishments had been inflicted for "such things as speaking disrespectfully of the views of

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tax-supported public school system to aid **religious groups** to spread their faith" (Id., p. 210). "The State also affords **sectarian groups** an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery" (Id., p. 212). The concurring opinion of Mr. Justice Frankfurter, in which three other Justices joined, says: "Illinois has here authorized the commingling of **sectarian** with secular instruction in the public schools. The Constitution of the United States forbids this" (Id., p. 212). **Appellants' brief misquotes this statement** (Brief, p. 9). Counsel overlooked the fact that the word "religious" appearing in the original opinion was changed in two places (pp. 212 and 220) to "sectarian." See front cover of Lawyers' Edition Advance Opinions, Vol. 92, No. 12.

[38] 330 U. S. 1, 8.

[39] Id., pp. 8-13.

[40] Id., p. 8.

ministers of *government-established churches*, non-attendance at those churches, expressions of non-belief in *their doctrines*, and failure to pay taxes and tithes to support them";[41] and dissenters were compelled "to pay tithes and taxes to support *government-sponsored churches*, whose ministers preached inflammatory sermons designed to strengthen and consolidate the *established faith* by generating a burning hatred against dissenters."[42] Every one of the evils recited by Justice Black arose from government aid to religious groups in league with the government, churches, sects, established faiths and doctrines. Not one of them arose from non-sectarian recognition of God by government "in public transactions and exercises," such as "opening legislative sessions with prayer or the reading of the Scriptures."[43]

The secularists demand that government give no en-

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[41] Id., p. 9.

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[42] Id., p. 10. Mr. Justice Black concludes this list of evils, intended to be stamped out by the First Amendment, with the statement that: "These practices became so commonplace as to shock the freedom-loving colonists into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain **churches** and **church property** aroused their indignation. **It was these feelings which found expression in the First Amendment.**" Id., p. 11. Mr. Justice Black cites (Id., p. 15, note 21) **Reuben Quick Bear v. Leupp**, 210 U. S. 50, in which it was indicated that "the government is necessarily **undenominational** as it cannot make any law respecting an establishment of religion"; and **Davis v. Beason**, 133 U. S. 333, in which it was said that "the First Amendment was intended * * * to prohibit legislation for support of any religious tenets, or the modes of worship of any **sect.**" He enunciates the principle that "neither a State nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another" (330 U. S. 1, 15), but he uses the word "religion" to mean "sectarianism", because he says that "the clause against establishment of religion by law was intended to erect 'a wall of separation between **church** and State'" (Id., p. 16), and in applying that principle to the precise issue before the Court (transportation of children to sectarian schools), he says: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any **church**." Id., p. 16.

[43] "No principle of constitutional law is violated * * * when legislative sessions are opened with prayers or the reading of the Scriptures." Cooley's Constitutional Limitations (8th ed., 1927), Vol. II, p. 974.

couragement or countenance whatever to religion; that all religion be eliminated from public education and other public exercises and transactions; that churches be taxed; that the employment of chaplains in Congress, state legislatures, army, navy and public institutions be discontinued; that all religious services now sustained by government be abolished; that the use of the Bible in the public schools be prohibited; that Thanksgiving day proclamations of the President and governors of the various states shall cease; that the judicial oath in the courts and official oaths at inaugurations and in all departments of government be abolished; that all laws enforcing the observance of Sunday be repealed; that all laws looking to the enforcement of Christian morality be abrogated, and that all laws shall be conformed to the requirements of "natural morality, equal rights and impartial liberty"; that our national motto "In God We Trust" be removed from our coins; that the "Church" flag above the national flag on battleships shall not be permitted; that religion shall not be "bootlegged" through dismissing of pupils for religious instruction during school hours; that marriage be completely secularized, with divorce upon request; that our entire political system shall be founded and administered on a purely secular basis; and that every trace of religion be eliminated from government procedure.[44]

In fact, the secularists demand not only separation of church and State but absolute and complete divorce of the State from religion.[45] They disregard religion as an im-

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[44] Stokes, Vol. III, pp. 593, 594; Frank Swancara, Separation of Religion and Government (New York, 1950), pp. 148, 149. The words of Mr. Justice Jackson were prophetic: "We are likely to have much business of the sort." **McCollum v. Board of Ed.** (1948), 333 U. S. 203, 238.

[45] "But let us remember that to try to prevent the State from the encouragement of religion, as distinct from the encouragement of theological creeds or ecclesiastical organizations, is both constitutionally unnecessary and politically unwise. The words of Plutarch may well be recalled: 'There never was a state of atheists. * * * Sooner may a city stand without foundations than a state without belief in the gods. This is the bond for all society and the pillar of all legislation.'" Stokes, Vol. III, p. 595.

portant consideration in life, and insist upon abstention by the State and its various agencies from any recognition of religion.[46]

Government recognition of God has never been considered by our nation or any of the States to be an establishment of religion or an encroachment upon the rights of conscience. In the light of our Judaeo-Christian tradition, it would be strange that a people, who regard religion as the basis of their civil and religious liberty, should put beyond the pale of the law, religious observances and exercises held sacred by almost the whole body of the people.[47] Such observances and exercises involve encouragements of religion which all religious sects share and which are part of the warp and woof of our national tradition.

The very essence of democracy is the Judaeo-Christian concept of the relation of man to God and of man to man. Democracy is the only true political expression of that concept. The Judaeo-Christian belief in God as our Creator, and the resulting corollary that if all men are children of God they must be brothers, are vital to the true concept of democracy.[48] Indeed, the Judaeo-Christian tradition is essential to the success of democracy. This is the basic reason why Adolph Hitler opposed that tradition; it runs counter to his ideology, which posited the inherent superiority of one race over all others and declined to consider

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[46] Stokes, Vol. I, pp. 30, 31.

[47] Cooley's Constitutional Limitations (8th Edition, 1927), Vol. II, p. 974. Cf. **Pirkey Brothers v. Commonwealth**, 134 Virginia 713, 114 S. E. 764; **Lindenmuller v. People**, 33 Barb. (N. Y.) 548; **Mahney v. Cools** (1855), 26 Pennsylvania 342, 347.

[48] The American type of democracy is based upon the Jewish-Christian religious tradition. "In this respect the spirit of democracy as we find it in the United States is the antithesis of totalitarianism in its various forms." Stokes, Vol. III, p. 679. This is why one so often hears such mottoes, or phrases as "for God and Country"; "patriotism and religion"; "religion and democracy."

the interests of a considerable minority in the population because of its racial origin.

Democracy cannot survive without the teachings and motivation of religion. To give to our public schools a completely secular atmosphere, so frequently found in continental Europe, is to strike at the very heart of the American type of democracy. For a state to continue to promulgate or sponsor non-sectarian religion is not inconsistent with the First and Fourteenth Amendments. It is not a function of the State to promote any church, sect, religious system, theological creed or ecclesiastical organization, but it may properly foster the Judaeo-Christian tradition by encouraging non-sectarian religion.

The State must never under any circumstances become anti-religious, irreligious or non-religious, and should do everything in its power, consistent with absolute and complete ecclesiastical and theological neutrality, to foster the moral and spiritual life of our people. To adopt the philosophy of the social irrelevance of all religion and its exclusion from the affairs of the state and its educational system and relegate it to the private forum of conscience is to adopt the fundamental tenet of secularism.

## Point II.

### The Virginia Bill for Religious Liberty did not disestablish state promulgation of non-sectarian religion.

The objective of Jefferson's famous "Bill for Religious Liberty" has been referred to by this Court in its interpretation of the First Amendment.[49] Asserting the "natural

[49] "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute." **Everson v. Board of Education** (1947), 330 U. S. 1, 13.

rights of mankind,"[50] the Virginia Statute, nevertheless, contains recognition by the state of "Almighty God" and a promulgation by the state of the fact that it is He who "hath created the mind free." A reading of the statute and Jefferson's writings regarding what was disestablished in Virginia[51] impels the conclusion that state promulgation of belief in God was not disestablished.

State aid or support of any kind to any church, whether discriminatory or not, compulsion to attend or support any church or religious worship of any church or ecclesiastical society, peculiar privileges to its members, disadvantages or penalties upon those who should reject its doctrines, disadvantages or penalties for maintaining religious opinions contrary to those propagated by any church or churches were the things which were disestablished. The disestablishment of all relations between the church and state was so complete that it included abolishment of taxes levied for the support of any church, upon its own members. When this was accomplished, Jefferson regarded the Virginia establishment of religion as "entirely put down."[52] Nothing could be clearer than the fact that he did not regard instruction at the State University as to "the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer"[53] as having been disestablished.

Jefferson and Madison intended to disestablish "an establishment of religion," such as the establishment of the Anglican Church in Virginia, or anything like it, but they

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[50] "The rights hereby asserted are of the natural rights of mankind." Sec. III of the Virginia Statute.

[51] Padover, pp. 1141, 1142.

[52] Id., p. 1142.

[53] Id., p. 1104. See note 7.

did not intend to prohibit expression of state or national religious devotion to God. On the contrary, Jefferson asked the nation to join with him in supplications to God to guide us, as a nation, in reliance upon Him as the one "in whose hands we are, who led our forefathers" and "who has covered our infancy with his providence, and our riper years with his wisdom and power." [54]

As Virginia was the first state to have entire religious freedom, having inherited the Jefferson tradition, it is a striking fact that the Virginia convention which ratified the Bill of Rights appointed a chaplain who read prayers at the opening of each session.[55]

It is significant that the court of last resort in Virginia, the home of religious liberty, has held that "freedom of religious opinion was never intended to set at naught * * * a religious observance held sacred by almost the whole body of the people." [56]

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[54] Id., p. 414.

[55] Stokes, Vol. III, p. 140. The Bible is read in most of the public schools in Virginia. Johnson, Church-State Relationships in the United States (Minneapolis, 1934), p. 311. Bible reading in the schools is impliedly permitted. Bulletin No. 14 (1930), U. S. Office of Education, p. 5. The Virginia State Board of Education has prepared a series of courses of Bible study, with "Directions for Securing High School Credit for Bible Study." High School pupils are permitted to substitute such courses for one of the regular electives. After the examination papers are graded, they are sent to the "State Bible Examiner" for review of the grades. Stokes, Vol. II, pp. 501, 502, 503; Johnson and Yost, Separation of Church and State in the United States (Minneapolis, 1948), p. 95.

[56] In **Pirkey Brothers v. Commonwealth** (1922), 134 Virginia 713, 114 S. E. 764, the Court, after quoting "Mr. Jefferson's great statute of religious freedom" and other statutory and constitutional provisions, said: "It will be observed from these declarations that, while there was a fixed purpose to sever church and state, and to give the fullest freedom of conscience, and to abolish tithes and spiritual courts, there was no assault upon Christianity or any other religious faith. Indeed the constitutional provision enjoins the exercise of Christian forbearance, love, and charity. The framers of those laws knew then, as we know now, 'that we are a Christian people and the morality of the country is deeply ingrafted upon Christianity,' and freedom of religious opinion was never intended to set at naught and bring into contempt a **religious observance** held sacred by almost the whole body of the people."

## Point III.

### The proceedings of the first congress display an intent that government promulgation of non-sectarian religion should not be disestablished by the first amendment

It is the purpose of the Constitution to "secure the Blessings of Liberty", mentioned in the Declaration of Independence, "to ourselves and our posterity." [57]

With a background of very definite connection of government and non-sectarian religion during the period from the Declaration of Independence to the adoption of the Constitution,[58] our first President and the First Congress pursued a course of action which, even to a greater extent than the traditions established by our government under the Articles of Confederation, promulgated an acknowledgment of God.

Congress had in 1782 placed its stamp of approval upon the first complete American edition of the Bible, published by Robert Aitken, by the adoption of a resolution praising it as a work "subservient to the interest of religion" and recommended "this edition of the Bible to the inhabitants

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[57] Preamble, U. S. Constitution. The Constitution "is but the body and the letter," and the Declaration of Independence "is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." **Gulf, Colorado and Santa Fe Rwy. Co. v. Ellis** (1897), 165 U. S. 150, 160. Moreover, the word "Blessings" is a word having religious connotation.

[58] In the Constitutional convention Franklin said: "In the beginning of the contest with Great Britain, when we were sensible of danger we had daily prayer in this room for the divine protection. Our prayers, Sir, were heard, and they were graciously answered. . . . To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity." Max Farrand, Records of the Federal Convention of 1787, revised edition (New Haven, 1937), Vol. I, p. 450; Id., Vol. III, pp. 296, 297. Franklin, John Adams and Jefferson, were appointed by the Continental Congress on July 4, 1776, as "a committee to prepare a device for a Seal of the United States of America." Journals of Congress—Ford Ed. V. 517; Gaillard Hunt, History of the Seal of the United States (1909), p. 8; Stokes, Vol. I, p. 467. Jefferson proposed the children of Israel in the wilderness "led by a cloud by day and a pillar of fire by night." Hunt, p. 9; Stokes, Vol. I, p. 468. The seal, finally adopted in 1782 and still in the form then approved, contains the Eye of Jehovah. Hunt, p. 42; Stokes, Vol. I, 468. The same idea is expressed on the dollar bill today.

of the United States, and hereby authorize him to publish this recommendation." [59]

In the Ordinance of 1787 for the government of the North-west Territory, continued in effect by act of the First Congress, August 7, 1789, after the adoption of the Federal Constitution, it was declared that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Lot Number 16 of every Township was set aside for the support of schools, and Lot Number 29 of every Township was set aside for the support of religion.[60]

President Washington kissed the Bible after taking the oath of office,[61] and a "divine service" at St. Paul's Chapel was part of Washington's inauguration.[62] It was an official service arranged for by both houses of Congress and conducted by their duly elected chaplain.[63]

In Washington's first address to Congress he mentioned the "Almighty Being, who rules over the universe—who presides in the councils of nations", and said: "No people can be bound to acknowledge and adore the invisible hand which conducts the affairs of men, more than the people of the United States." [64] Congress adopted a resolution ac-

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[59] Stokes, Vol. I, p. 473.

[60] Thorpe, V., 2912; Stokes, Vol. I, pp. 480, 481. The Ohio constitution of 1802 provided that laws should be passed to secure "to each and every denomination of religious societies in each surveyed Township, which now is or may hereafter be formed in the State, an equal participation, according to their number of adherents, of the profits arising from the land granted by Congress for the support of religion, agreeably to the ordinance or act of Congress making the appropriation." Thorpe, V., 2912; Stokes, Vol. I, p. 481.

[61] Stokes, Vol. I, p. 486.

[62] Journal of the First Session of the Senate (Washington, Gales and Seaton, 1820), Journal for April 29, 1789; Stokes, Vol. I, p. 485.

[63] Stokes, Vol. I, pp. 485, 486.

[64] Annals of Congress, p. 27.

knowledging the President's address, in which it stated: "We are, with you, unavoidably led to acknowledge and adore the Great Arbiter of the universe, by whom empires rise and fall." [65]

The word "Religion" appears only once in the Constitution, i. e. in the First Amendment, and the word "religious" appears only in the prohibition of any religious test as a qualification for Federal office, in Article VI, Paragraph 3, which prohibition is annexed to the provision requiring oaths of office.[66]

New Jersey was the first state to ratify the First Amendment,[67] such action having been taken on November 20, 1789, while Virginia was the eleventh.[68]

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[65] Id., p. 32.

[66] "The Senators and Representatives before mentioned, and the Members of the Several State Legislatures, and all executives and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." U. S. Constitution Art. VI, Par. 3. This permits, but does not require, an inauguration to be a religious ceremony. The oath of office required to be taken by justices of the United States Supreme Court begins with the words "I, ....., do solemnly swear (or affirm)" and concludes with the words "So help me God." U. S. C. A. 28:453. The oath required to be taken by Federal office holders is similar. U. S. C. A. 5:16. See requirement of oath or affirmation in Article I, Sec. 3(6), and Article II, Sec. 1(8) of the Constitution, and the Fourth Amendment.

[67] Although New Jersey's first Constitution, adopted July 2, 1776, provided in Section 19 that "there shall be no establishment of any one religious sect in this Province in preference to another," it expressly conferred full civil rights and the right to hold public office upon Protestants only. This discrimination was eliminated by the Constitution of 1844, Art. I, Sec. 4: "There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles." In adopting that provision New Jersey was "guided by the inspiring influence" of Article VI, Par. 3, of the Federal Constitution and the First Amendment. **Knibb v. Knibb** (Ct. of Errors and Appeals, 1923), 94 N. J. E. 747, 752, 121 A. 715, 717. The provisions of Art. I, Sec. 3, of the 1844 Constitution (substantially the same as Sec. 18 of the 1776 Constitution) are in part as follows: "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; * * *." The preamble and Art. I, Sec. 3 and 4 of the 1844 Constitution were included, without change, in the 1947 Constitution.

[68] Virginia postponed ratification of the First Amendment until Dec. 15, 1791 (Annals of Congress, p. 54), after it had been ratified by the

Charles Pinckney, of South Carolina, on May 29, 1787, at the constitutional convention, had urged the adoption of a provision that: "The legislature of the United States shall pass no law on the subject of religion",[69] but there appears to be no record of any formal discussion in the convention relative to this proposal.[70]

A majority of the states probably would have refused to ratify the constitution had it not been for the assurance of Washington and other leaders that a bill of rights would be approved by the First Congress when it met.[71]

Madison did not think that the omission of a bill of rights was a material defect.[72] Referring to the words of the establishment of religion clause of the First Amendment, as introduced by him, Madison said that "they had been required by some of the State Conventions."[73] It was, therefore, the requests of the States for amendments which induced the First Congress to propose amendments at its first session, a fact which is clearly established by the pre-

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required three-fourths of the states. Edward S. Corwin, A Constitution of Powers in a Secular State (Charlottesville, 1951), p. 102, note 33.

[69] Elliott's Debates, Vol. V, p. 131.

[70] Stokes, Vol. I, pp. 526, 527.

[71] **Maxwell v. Dow**, 176 U. S. 581, 607; Stokes, Vol. I, p. 606.

[72] "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendments, for any other than that it is anxiously desired by others." Letter to Jefferson, Madison Writings (1865), Vol. I, p. 424. On June 8, 1789, Madison clearly indicated that he was merely keeping the pledge which had been made to the states: "This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible . . ." Annals of Congress, Vol. I, p. 424.

[73] Annals of Congress, Vol. I, p. 757.

amble of the joint resolution of Congress submitting the Bill of Rights to the States for ratification.[74]

None of the amendments requested by the several states were directed against government recognition of God or government promulgation of belief in God. They embodied the principle of separation of church and State, i. e. separation of government and sectarian religion. The day following the ratification by the Virginia Convention, it adopted a proposed "declaration or bill of rights" recommended as an amendment to the Constitution, in which it is clearly indicated that it used the word "religion" to mean "religious sect or society": "That religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; * * * and that no particular religious sect or society ought to be favored or established, by law, in preference to others."[75] The same is true of the declaration contained in the ratifying resolution adopted by New York's Convention: "That the people have an equal, natural, and inalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."[76] North Carolina's first convention neither ratified nor rejected the Constitution, but it passed a declaration of rights which was identical with that proposed by Virginia.[77] Rhode Island's Con-

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[74] "The conventions of a number of states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution." 1 U. S. Stat. L. 97.

[75] Elliott's Debates, Vol. III, p. 659.

[76] Id., Vol. I, p. 328.

[77] Id., Vol. IV, pp. 244, 251.

vention adopted a declaration which was practically the same as the one adopted by Virginia.[78] The New Hampshire convention requested the following amendment: "Congress shall make no laws touching religion * * *."[79] The amendment requested by New Hampshire was probably intended to deprive Congress of power either to establish or disestablish any sect, having in mind its own existing establishment of religion in that State. Its Constitution required its governor and members of its legislature to be of the Protestant religion, and authorized municipal support of protestant teachers of religion.[80] The following amendment was proposed in the Maryland convention but not adopted by it: "That there be no national religion established by law * * *."[81]

An amendment representing Madison's philosophy regarding restraint against the states with respect to religious liberty was introduced by him but was not submitted by Congress to the states for ratification.[82] It did not contain a provision against an establishment of religion, probably because there were several states which then had either "single or multiple establishments". They "were all Protestant establishments, and did not include Catholics and Jews."[83]

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[78] Id., Vol. I, p. 334.

[79] Id., p. 326.

[80] Thorpe, Constitution, Vol. IV, p. 2454.

[81] Elliott's Debates, Vol. II, p. 553.

[82] "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Annals of Congress, Vol. I, p. 435. This amendment was approved by the House but was "disagreed to" by the Senate on September 21, 1789. Annals of Congress, Vol. I, p. 86. "Mr. Madison conceived this to be the most valuable amendment in the whole list." Annals of Congress, Vol. I, pp. 783, 784.

[83] Edward S. Corwin, A Constitution of Powers in a Secular State (1951), preface.

As introduced by Madison on June 8, 1789, the "establishment of religion" clause read: "* * * nor shall any national religion be established." [84] As reported out by a committee of eleven members, it provided: "No religion shall be established by law * * *." [85] On August 15, 1789, the House, sitting as a committee of the whole, began consideration of the proposed amendment as reported out by the committee,[86] and on motion made by Samuel Livermore, of New Hampshire; the clause was changed to read:

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[84] Annals of Congress, Vol. I, p. 434: The aim of Madison in framing the First Amendment "was to strike down financial aid to religious **institutions** out of the public purse." Irving Brant, James Madison, The Nationalist (1948), pp. 353, 354.

[85] Annals of Congress, Vol. I, 729.

[86] "MR. SYLVESTER had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether. * * * MR. GERRY said it would read better if it was, that no religious doctrine shall be established by law. * * * MR. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and **enforce** the legal observation of it by law, nor **compel** men to worship God in any manner contrary to their conscience. * * * to prevent these effects he presumed the amendment was intended, and he thought it was as well expressed as the nature of the language would admit. MR. HUNTINGTON said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. * * * By the charter of **Rhode Island**, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion, **but not to patronize those who professed no religion at all.**" The people of Rhode Island (a State outstanding in the history of religious liberty) were then enjoying the blessed fruits of disestablishment, but it did not include disestablishment of state recognition of non-sectarian religion. **Madison made an immediate reply to Huntington,** as follows: "MR. MADISON thought, if the word 'National' was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one **sect** might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment **directly to the object it was intended to prevent.**" **In those words Madison expressed the definite and well-defined desire of the states for an amendment against establishment of sectarian religion.** Id., pp. 729-731.

"Congress shall make no laws touching religion * * *."[87] On August 20, 1789, on motion of Fisher Ames, of Massachusetts, it was changed to read: "Congress shall make no law establishing religion * * *."[88]

It is quite clear from the record that the Senate was not satisfied with the draft received from the House, and on September 3, it rejected several other proposed drafts of the Amendment.[89] The wording of the drafts proposed and their rejection show that the Senate was not satisfied with any proposal which merely prevented an advantage to any one denomination or sect over others, as far as Church-State separation was concerned. It wished to go further. Provisions against laws establishing "*one* religious sect or society *in preference to others*" or "*any* religious sect or society" or "*any particular* denomination of religion *in preference to another*" appear to have been regarded as not broad enough to prohibit government appropriations to any or all religious sects or societies. The Senate clearly intended to prohibit any government aid to religious sects or

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[87] Annals of Congress, Vol. I, pp. 729-731. This is the same as the wording of the amendment requested by the New Hampshire ratifying convention. See note 79. New Hampshire then had an establishment of religion (see note 80), and the purpose of its proposed amendment probably was to leave the subject of religion entirely to the states.

[88] Annals of Congress, Vol. I, p. 766. The language of the amendment as received in the Senate on August 25, 1789, was: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Journal of the First Session of the Senate, p. 63; **Murdock v. Pennsylvania** (1943), 319 U. S. 105, 124, note 6.

[89] On that day, the Senate passed a motion to strike out the words "nor shall the rights of conscience be infringed," but it rejected the following drafts of the amendment: "Congress shall make no law establishing **one** religious sect or society **in preference to others.**" (This draft was the result of a motion to strike out the words "religion, or prohibiting the free exercise thereof," and insert the words "one religious sect or society in preference to others.") "Congress shall not make any law * * * establishing **any** religious sect or society." "Congress shall make no law establishing **any** particular denomination of religion **in preference to another** * * *." Journal of the First Session of the Senate, p. 70.

societies, whether discriminatory or not. Its intention was not merely to prohibit the government from setting up or establishing a religious sect or society, but also to prohibit government aid "to any or all religious faiths or sects in the dissemination of their doctrines", and participation "in the affairs of any religious organizations or groups." [90] This objective of the Senate was similar to the objective accomplished in Virginia as a result of the unwillingness of Jefferson, Madison and others, in the fight against Henry's assessment bill, to substitute multiple establishment of sects as a substitute for the old single establishment.

On September 9, the Senate approved the following wording of the Amendment: "Congress shall make no law establishing articles of faith or a mode of worship,[91] or prohibiting the free exercise of religion * * *." [92] This substitution by the Senate of the words "articles of faith or a mode of worship", for the word "religion" in the draft received from the House,[93] indicates that the Senate agreed with Madison's belief that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." [94]

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[90] **McCollum v. Bd. of Ed.**, 333 U. S. 203, 211; **Everson v. Bd. of Ed.**, 330 U. S. 1, 16.

[91] This Court has said that the First Amendment was intended "to prohibit legislation for the support of any religious tenets, or the modes of worship of any **sect.**" **Davis v. Beason** (1889), 133 U. S. 342. It forbids a State "to aid **religious groups** to spread their faith." It prohibits "aid" to "any or all religious faiths or **sects** in the dissemination of their doctrines." **McCollum v. Bd. of Ed.**, 333 U. S. 203, 210, 211.

[92] Journal of the First Session of the Senate, p. 77; **Murdock v. Pennsylvania**, 319 U. S. 105, 124, note 6.

[93] It should be kept in mind that Madison's draft had been rejected in the House, and Livermore's draft had been substituted for it. Their objectives were different. Madison wanted to deny Congress power to make "an establishment" of any or all sects; while Livermore desired to deprive Congress of power either to establish or disestablish any or all sects in order to protect the existing Protestant establishment in New Hampshire.

[94] See note 86.

On September 21 a Senate-House conference committee was appointed,[95] and it substituted the words "respecting an establishment of religion" for the words "establishing articles of faith or a mode of worship."[96] The word "establishing" thus became "an establishment of", and the word "religion" could then be safely restored, and the amendment became a prohibition against "any law respecting *an establishment of religion*", not religion itself. This is significant when it is realized that the House rejected Livermore draft, which prohibited "laws *touching* religion", and that the Senate rejected the draft received from the House, which prohibited "any law *establishing* religion." A contention that government recognition of God is prohibited by the First Amendment, or that separation of government and non-sectarian religion is required by it, completely ignores the fact that the draft of the amendment approved by the House and sent to the Senate, which prohibited "any law establishing *religion*", was changed to its final form, which prohibits "any law *respecting an establishment* of religion." It ignores, too, the fact that the First Amendment prohibits "any law respecting an *establishment of* religion", not "any law respecting *religion*." Had it been the intent of the First Amendment to prohibit *all* connection between government and religion, it would have prohibited "any law respecting religion", not merely "any law respecting an establishment of religion." The final draft of the amendment preserved intact the meaning which Madison had so clearly ascribed to his draft of it in the debates in the House and the meaning which the Senate had expressed in its draft.

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[95] Journal of the Senate, p. 84.

[96] The House approved the conference committee's draft on Sept. 24 (Annals of Congress, Vol. I, p. 913), and the Senate approved it on Sept. 25 (Id., p. 88).

The multitude of our government subventions to religion is an important circumstance to be considered in the interpretation of the First Amendment.[97] Particularly important are the actions of the First Congress in this respect.[98]

On September 24, 1789, the day that the First Congress adopted its resolution submitting the First Amendment to the states for ratification, it adopted a resolution requesting the President to recommend to the people of the United States "a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness." [99]

The First Congress adopted a resolution providing for a chaplain for each house,[100] and an act for the raising of a

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[97] Harvard Law Review, Volume 62, p. 1306, article by Arthur E. Southerland, Jr., entitled "Due Process and Disestablishment."

[98] "We are to place ourselves as nearly as possible in the condition of the men who framed that instrument." **Ex parte Bain** (1887), 121 U. S. 1, 12. "It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument." **Myers v. United States** (1926), 272 U. S. 52, 174; **Patton v. United States** (1929), 281 U. S. 276, 300; **Ex parte Richard Quirin** (1942), 317 U. S. 1, 41.

[99] Annals of Congress, Vol. I, pp. 914, 915. The resolution was adopted in spite of the fact that Thomas T. Tucker, of South Carolina, argued "it is a business with which Congress has nothing to do; it is a religious matter, and as such is prescribed to us." Charles Warren, Odd Byways in American History, p. 222; Stokes, Vol. I, p. 487. Washington issued a proclamation in which he said "it is the duty of nations to acknowledge the providence of Almighty God." Stokes, Vol. I, p. 487.

[100] Annals of Congress, p. 932. James Madison was a member of the Congressional Committee which planned the Chaplain system of Congress. Reports of Committees, House of Representatives, Vol. II, p. 124.

regiment of troops, which provided for the appointment and pay of a chaplain.[101]

Under the Judiciary Act of 1789, passed by the First Congress, witnesses were disqualified who did "not believe that there is a God who rewards truth, and avenges falsehood," which continued in effect until 1906, when an amendment was adopted providing that the qualifications of witnesses are to be determined by the laws of the state in which the court sits.[102]

The members of the First Congress understood, if any one did, the true purport of the First Amendment, and the proceedings of that Congress display a definite intent that government promulgation of non-sectarian religion should not be disestablished by the Amendment.

## Point IV.

**The first amendment and the principle of separation of church and state have never been construed to require disestablishment of all relations between government and religion.**

The "establishment of religion" and "free exercise of religion" clauses of the First Amendment, like the freedom of

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[101] Act of March 3, 1791, 1st Congress, 3rd Sess., 1 Stat. 222. "If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government? * * * They, if anyone did, understood the true purport of the amendment * * * they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. * * * On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world and an habitual reliance upon His protection of the righteous cause which they commended to His care." Reports of Committees of the Senate, 32nd Cong., 2nd Sess., 1852-1853; Senate Report No. 376, Jan. 19, 1853. Also see Report No. 124, House of Representatives, 33rd Congress, 1st sess., Mar. 27, 1854.

[102] See account of this in Stokes, Vol. III, p. 146, Cf. with statement in Washington's Farewell Address. Note 30.

speech or freedom of the press clauses, are subject to exceptions. There was no intention to disregard the exceptions which have from time immemorial been treated as not within their purview, and which are not within their spirit.[103] The religious clauses of the First Amendment and the principle of separation of church and state have never been construed to abrogate all relations between government and religion. In fact, this Court has based some of its decisions on the premise that there is a connection between religion and government.[104]

In applying the principle of separation of church and state, care must be exercised not to apply it in such a manner as to prohibit legislation which is not related to the reasons which brought the doctrine into existence.[105]

The words "absolute and complete separation of govern-

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[103] "There was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (Art.1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; * * *" **Robertson v. Baldwin** (1897), 165 U. S. 275, 281, 282. Such exceptions, although within the letter, are not "within the spirit" of the amendment. Id., p. 281; Cf. **Church of the Holy Trinity v. United States** (1892), 143 U. S. 457, 472.

[104] "It (polygamy) is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world." **Church of Jesus Christ of Latter Day Saints v. United States** (1889), 136 U. S. 1, 49; **Davis v. Beason** (1889), 133 U. S. 333, 341.

[105] "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." **Snyder v. Massachusetts** (1933), 291 U. S. 97, 114. "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now * * *. Delusive exactness is a source of fallacy throughout the law." **Truax v. Corrigan** (1921), 257 U. S. 312, 342 (Dissenting opinion of Mr. Justice Holmes). "Mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." **McCollum v. Bd. of Ed.**, 333 U. S. 203, 212 (Mr. Justice Frankfurter's concurring opinion).

ment and religion" or "absolute and complete secularization of the public schools" cannot be substituted for the language of the First Amendment. To paraphrase the language used by Mr. Justice Black in a case decided in 1945, "they were not chosen by those who wrote the" First Amendment or "Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives."[106]

Applying the principle that "most of the distinctions in the law are distinctions of degree,"[107] in prescribing the limits of State fostering of religion, there would seem to be some degree to which New Jersey can preserve the American tradition associating religion with education.

Congressional, army and navy chaplains, chapels at West Point and Annapolis, Congressional exemption of churches from taxation,[108] Bible reading in the schools in the District of Columbia,[109] requirement that the superintendent of the National Training School for Boys employ such methods as will "secure in them fixed habits of religion,"[110] expenditure

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[106] **International Shoe Co. v. Washington** (1945), 326 U. S. 310, 325.

[107] "In those days (Marshall's) it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power, it was assumed that they had all power, and that the necessary alternative was to deny it altogether." **Panhandle Oil Co. v. Knox** (1928), 277 U. S. 218, 223 (dissenting opinion of Mr. Justice Holmes). A federal taxpayer's suit to prevent payment of salaries to chaplains of the Senate, House of Representatives, Army and Navy, was dismissed. **Elliott v. White** (1928), 23 F. 2d 997. The refusal to recognize the taxpayer's action is essentially a ruling of **de minimus. Anderson v. Mt. Clemens Pottery Co.** (1946), 328 U. S. 680, 692.

[108] D. C. Code, sections 47-801, 43-1533 (1940). **Gibbons v. District of Columbia** (1886), 116 U. S. 404, 407. "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government." **Mass. Gen. Hospital v. Belmont**, 233 Mass. 190, 203, 124 N. E. 21, 25.

[109] By-laws of Dist. of Columbia Bd. of Ed., 1926, Chap. 6, Sec. 4.

[110] D. C. Code, Sec. 32-811 (1940).

of public funds for education and training of young men for the clergy;[111] Federal expenditures toward the construction of or additions to denominational hospitals,[112] motto "In God We Trust" on our coins,[113] and a multitude of other governmental subventions to religion,[114] being a continuous practical construction given to the First Amendment by legislation, are highly persuasive that the authors of the Amendment had no intention to abrogate all relation between government and religion.

*Reynolds v. United States*[115] and *Davis v. Beason*[116] establish the principle that the religious liberty secured by the "free exercise" of religion clause of the First Amendment is subject to the inherent authority of Congress (and under the Fourteenth Amendment and later decisions, the states) to legislate within the limits of the police power for the general welfare.[117] Thus the right to "free exercise" of religion, unqualified and absolute in the language of the First Amendment, is "subordinate" to laws prohibiting actions "regarded by general consent" as "inimical" to society, and such laws "enforce an outward conformity to a pre-

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[111] Under G. I. Bill of Rights, 58 Stat. 289.

[112] 60 Stat. 1041.

[113] Act of Mar. 3, 1865; 13 Stat. 518. In 1907 the motto was left off some new coins; Stokes, Vol. III, p. 603. The protest was so great that Congress made its inscription on the coins mandatory. Act May 18, 1908; 35 Stat. 164.

[114] To list all the Federal and State recognitions, or subsidies to religion would be an endless task.

[115] 98 U. S. 145.

[116] 133 U. S. 333.

[117] Religious liberty does not justify one in refusing to bear arms or in doing acts which violate the child labor laws or which constitute a breach of the peace. **In re Summers** (1945), 325 U. S. 561; **Prince v. Massachusetts** (1944), 321 U. S. 158; **Chapinsky v. New Hampshire** (1942), 315 U. S. 568.

scribed" standard[118] with respect to an "important feature of social life."[119]

*Bradfield v. Roberts*[120] was the first case in which a direct issue was sought to be raised under the "establishment of religion" prohibition. The case involved an appropriation to erect certain additions to a hospital, and this Court held that it was not material that the hospital was conducted under the auspices of the Roman Catholic Church.[121]

*Quick Bear v. Leupp*[122] involved the payment by the Federal Government to Indians of the Sioux tribe of their own funds (held in trust) for the education of Indians in Catholic schools of their own choice. This Court, while stating that "the government is necessarily undenominational," rejected the argument of counsel that the government cannot act in a sectarian capacity with respect to trust funds.[123]

In *Arver v. United States*,[124] the statute involved was the Selective Draft Act of 1917, and this Court summarily rejected the contention that the exemption of certain classes

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[118] **Davis v. Beason**, 133 U. S. 333, 342.

[119] **Reynolds v. United States**, 98 U. S. 145, 165.

[120] 175 U. S. 291 (1899).

[121] Id., at 298. Immediately after this case arose Congress enacted a statute declaring it to be "the policy of the government of the United States to make no appropriation of money or property for the purpose of founding, maintaining or aiding by payment for services, expenses, or otherwise, any **church** or religious **denomination**, or any institution or society which is under **sectarian** or **ecclesiastical** control. 29 Stat. 411 (1896).

[122] 210 U. S. 50 (1908).

[123] Referring to the statute quoted in note 121, this Court quoted with approval the declaration of the Court of Appeals that "it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion among the Indians." Id., at 82. It seems indisputable that the Government acted in a denominational or sectarian capacity, even though as a trustee, to aid the Indians in the free exercise of religion.

[124] 245 U. S. 366 (1918).

of persons by reason of their religious calling or belief rendered it unconstitutional.[125]

By this Court's decision in *Pierce v. Society of Sisters of Holy Name*,[126] it is now settled that compulsory school attendance laws must permit attendance at sectarian schools which meet public school standards.[127]

In *Cochran v. State Bd. of Education*,[128] the furnishing of text books to children attending sectarian schools was sustained, and in *Everson v. Board of Education*,[129] the furnishing of transportation to children attending such schools was sustained.[130]

In *Saia v. New York*,[131] this court held that a municipality had improperly refused to permit a member of a religious sect to use a tax-established and tax-supported public park for the purpose of lecturing on religious subjects.

These cases fully demonstrate the fact that the First Amendment does not abrogate all relations between religion and government, nor completely isolate each from the other.

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[125] "We pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof, repugnant to the First Amendment, resulted from the exemption clauses of the act * * *." Id. at 390.

[126] 268 U. S. 510 (1925).

[127] Thus the children are aided in the free exercise of religion. "It is an inevitable implication of the case that compulsory school laws which **permit** attendance at parochial schools are constitutional, notwithstanding the compulsion which is thereby lent such schools in 'recruiting' pupils." Corwin, A Constitution of Powers In A Secular State, p. 115.

[128] 281 U. S. 370 (1930).

[129] 330 U. S. 1 (1947).

[130] "It is undoubtedly true that children are helped to get to church schools." Id., p. 17.

[131] 334 U. S. 558 (1948).

## Point V.

**The first amendment, as made applicable to the states by the Fourteenth Amendment, does not disestablish Bible reading and the repeating of the Lord's Prayer in the public schools.**

The Bible is not an intruder in the public schools. Whether or not one is afflicted with "emotional astigmatism,"[132] it would be impossible for him, or anyone else, not to see that the Bible has been in the public schools since the earliest days of our history.[133]

We do not believe it is "emotional astigmatism" which causes us to reject the view that the Bible is "a monument over the grave of Christianity" and that it has reached the "end of its literary influence."[134]

No one who is familiar with the historical significance of the First Amendment and the full meaning of the principle of separation of Church and State can controvert the conclusion reached by Mr. Justice Frankfurter in his concurring opinion in *McCollum v. Board of Education*[135] that

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[132] Appellants' brief, p. 11. They state that Appellees' briefs in the State Court, and the opinion of the State Court "evinces such an emotional reaction." Brief, pp. 11, 12.

[133] Dr. Benjamin Rush, one of the signers of the Declaration of Independence, urged the reading of the Bible in the public schools and stressed not only its moral and religious character but its possession of the very soul of democracy—equality of men, respect for just laws, and the essential virtues. Moehlman, School and Church, p. 65; Stokes, Vol. 2, p. 49.

[134] Appellants say this case is not an assault on the Bible (Brief, p. 12), but they include the following quotation in their brief: "Those who talk of the Bible as a 'monument of English prose' are merely admiring it as a monument over the grave of Christianity. * * * And the fact that men of letters now discuss it as 'literature' probably indicates the end of its 'literary' influence." Appellants' brief, p. 21.

[135] 333 U. S. 203, 212 (1948). Three other justices joined in the opinion.

the Constitution prohibits "the commingling of *sectarian* with secular instruction in the public schools,"[136] as exemplified by the sectarian classes banned by the Court in that case.[137] "The candid purpose" of those classes was "sectarian teaching."[138]

Mr. Justice Frankfurter "considered the relevant history of religious education in America,"[139] and reached the following conclusions:

> "The modern public school derived from a philosophy of freedom reflected in the First Amendment. * * *[140] long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious (sectarian)[141] instruction became the guiding principle, in law and feeling, of the American people. * * *
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> "Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it bind-

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[136] "Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this." Id., p. 212. He refers again to the "Prohibition of the commingling of **sectarian** and secular instruction in the public schools * * *." Id., p. 220.

[137] We have referred to the Court's opinion, written by Mr. Justice Black, in an earlier part of this brief.

[138] Id., p. 226.

[139] Id., p. 213.

[140] Id., p. 214.

[141] We feel justified in suggesting that the word "sectarian" should be here substituted for the word "religious," in view of two similar substitutions made in the opinion at pages 212 and 220 (see note 37), and in view of the relevant history reviewed in the opinion.

ing upon the States, the basis of the restriction is the whole experience of our people."[142]

Mr. Justice Frankfurter, in his review of the relevant history of religious education says that "in Massachusetts largely through the efforts of Horace Mann, all *sectarian* teachings were barred from the common school to save it from being rent by denominational conflict."[143]

In 1826 Massachusetts adopted a statute requiring the daily reading of the Bible in the public schools.[144] In 1866 the Massachusetts Court sustained the reading of the Bible in the schools.[145]

Under the leadership of Horace Mann, the greatest of American public school exponents, the public school system of Massachusetts by 1855 had eliminated sectarian instruction.[146] He took a firm stand, however, against purely secular education and in favor of Bible reading in the schools.

"Horace Mann was opposed to sectarian doctrinal instruction in the schools, but he repeatedly urged the teaching of the elements of religion common to all the Christian sects. He took a firm stand against the idea of a purely secular education, * * *. Lest his name should go down in history as that of one who had at-

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[142] Id., p. 215. "Separation is a requirement to abstain from fusing functions of Government and of religious **sects**, not merely to treat them all equally." Id., p. 227.

[143] Id., p. 215. "In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to **church** schools, and later to any school in which **sectarian** doctrine was taught." Id., p. 214.

[144] Laws of 1927, Chap. 71, Sec. 31. Originally enacted in 1826. Church-State Relationships In The United States, Johnson, p. 26.

[145] **Spiller v. Woburn** (1866), 94 Mass. 127.

[146] Sherman M. Smith, the Relations of the State to Religious Education in Massachusetts, p. 142; Stokes, Vol. II, p. 54.

tempted to drive religious instruction from the schools, he devoted several pages in his final report—the twelfth—to a statement in which he denied the charges of his enemies."[147]

In his final report in 1848, Horace Mann said:

"I believed then (1837), as now, that sectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools.

"I believed then, as now, that religious instruction in our schools, to the extent which the Constitution and the laws of the State allowed and prescribed, was indispensable to their highest welfare, and essential to the vitality of moral education.

"I avail myself of this, the last opportunity which I may ever have, to say in regard to all affirmations or intimations that I have ever attempted to exclude religious instruction from the schools, or to exclude the Bible from the schools, or to impair the force of that volume, that they are now, and always have been, without substance or semblance of truth.

"Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, *to speak for itself*."[148]

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[147] Raymond B. Culver, Horace Mann and Religion In The Massachusetts Public Schools (1929), p. 235. In his eleventh annual report, Horace Mann said: "* * * I suppose there is not, at the present time, a single town in the Commonwealth in whose schools it is not read. Whoever, therefore, believes in the Sacred Scriptures, has his belief, in form and in spirit, in the schools, and his children read and hear **the words themselves** which contain it." Smith, p. 175; Stokes, Vol. II, 56.

[148] Horace Mann, Annual Reports, (Boston, 1891), Vol. IV, p. 308; Stokes, Vol. II, p. 57. The Constitution of Massachusetts prohibits the use of public funds for the support of any school, "under public control or otherwise, wherein any denial

Today the Bible is read in all the public schools in Massachusetts.[149]

Continuing his review of history, in the *McCollum* case, Mr. Justice Frankfurter mentions President Grant's famous remarks in 1875 to the Convention of the Army of the Tennessee,[150] and points out that Grant's conviction regarding separation of church and state was so great that he urged an amendment to the Constitution,[151] and that shortly thereafter, in 1876, the Blaine Amendment was introduced in Congress.[152] Sponsored and supported by a President and members of Congress who were the most ardent advocates of the principle of separation of church and state in our history, having the most deeply rooted convictions regarding that principle at a period when it "was firmly established in the consciousness of the nation"[153] and "dominant in our national life,"[154] the Blaine Amendment is significant in its provision that the Bible shall not be excluded from the public schools:

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[149] Johnson, p. 301.

[150] 333 U. S. 203, 218. Grant opposed appropriations "to the support of any **sectarian** schools" and any schools "other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with **sectarian**, pagan, or atheistical dogmas," and added: "Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." 333 U. S. 203, 218. He used the words "religion" and "church" to mean "sectarianism."

[151] Id., p. 218.

[152] The House passed the Blaine Amendment by the overwhelming vote of 180 to 7, and it lacked by two votes the necessary two-third majority which would have resulted in its submission to the states. See Article on Blaine Amendment in Harvard Law Review, Vol. 64, p. 939, at pp. 942, 943.

[153] 333 U. S. 203, 217.

[154] Id., p. 215.

"This article shall not be construed to prohibit the reading of the Bible in any school or institution."[155]

It is significant too that "every state admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system free from *sectarian* control.' "[156]

In the Spring of 1944, the American Council on Education, with the cooperation of the National Conference of Christians and Jews assembled a group of educators at Princeton, to discuss the relation of religion to public education. The conference included representatives of education, under both public and private auspices, and leaders of the Catholic, Protestant and Jewish faiths. Following that meeting the American Council created the Committee on Religion and Education. After extensive study of the relation of religion and education the Committee made its first report, in which it said:

"We reject secularism as a philosophy of life and we cannot agree that it has ever been accepted as such by the American people.

"* * * The fact that our population is religiously heterogenous puts the separation of church and state, as a broad political principle, beyond debate, regardless of

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[155] Id., p. 218, note 6. Elihu Root, mentioned by Mr. Justice Frankfurter, firmly believed in "maintaining the great American principle of eternal separation between **Church** and State" (Id., p. 219), but he saw no objection to prayer for divine guidance as part of State transactions and exercises. "State constitutional conventions are also generally opened with prayer. In 1915, in New York, when the expected chaplain failed to appear, the presiding officer, the Honorable Elihu Root (1845-1937), though a layman, led the assembly in a simple but earnest and appropriate prayer for divine guidance." Stokes, Vol. III, p. 141.

[156] 333 U. S. 203, 220.

what theories may be held concerning what would be appropriate in a different kind of society.

* * * * * * * * *

"The assumption that a school system from which all study of religion should be excluded was what the American people really wanted when they secularized education runs counter not only to our educational, but to our religious, history. * * * Our purpose here is to correct the impression that the divorce of education from religion was what was desired when *sectarian* teaching was banished from the schools.

* * * * * * * * *

"* * * Underneath the cleavage between Catholic and Protestant, between Christian and Jew, is the stream of the Judaeo-Christian tradition with its conception of the common source and spiritual equality of all men as the children of God; the obligation to respect the supreme worth of persons and the wickedness of exploiting them; the golden quality of mercy; the meaning of redemptive love; the inexorableness of the law that he that soweth the wind shall reap the whirlwind. These are great cohesive spiritual forces to which the secular order of society probably owes more than it suspects.

* * * * * * * * *

"* * * Holding to the principle of the separation of church and state in America, we nevertheless deplore what we consider a strained application of that principle in our school system. We are unable to believe that a school which accepts responsibility for bringing its students into full possession of their cultural heritage can be considered to have performed its task if it

leaves them without a knowledge of the role of religion in our history, its relation to other phases of the culture, and the ways in which the religious life of the American community is expressed."[157]

Other outstanding educators have expressed similar views.

Dr. Nicholas Murray Butler says:

"The separation of church and state is fundamental in our American political order, but so far as religious instruction is concerned, this principle has been so far departed from as to put the whole force and influence of the tax-supported school on the side of one element of the population, namely, that which is pagan and believes in no religion whatsoever." [158]

Dr. Luther A. Weigle, Dean of Yale Divinity School, said:

"There is nothing in the principle of religious freedom or the separation of church and state to hinder the school's acknowledgment of the power and goodness of God. * * * We must keep sectarianism out of our public schools. But that does not necessitate stripping the schools of religion. To exclude religion from the public schools would be to surrender these schools to the sectarianism of atheism or irreligion." [159]

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[157] The Relation of Religion to Public Education, the Basic Principles (Washington, 1947), Committee on Religion and Education, American Council on Education, pp. 1, 2, 8, 9, 47, 49, 50; printed as an appendix in Religion's Place in General Education, Nevin C. Harner (Richmond, 1949), p. 89, at pp. 98, 99, 107, 159, 162.

[158] Religion's Place in General Education, Nevin C. Harner, p. 42.

[159] Id.

Dr. Alexander Meiklejohn, President of Amherst College, 1912-1924, Professor of Philosophy and Chairman of the Experimental College, University of Wisconsin, 1926-1938, says:

> "* * * In whatever varied ways are available, the general welfare requires that our young people learn the lessons which we call 'spiritual.'"
>
> "* * * My own beliefs are definitely on the side of nonreligion. So far as I can see, human purposes have no extra-human backing. Yet, so long as half our people, more or less, are interpreting and conducting their lives, their family relationships, the upbringing of their children upon a basis of some religious belief, the Constitution requires of us that those beliefs shall be given not only equal status but also positive status in the public planning of education. * * *"[160]

Since this Court said, more than 100 years ago, that the Bible is not a sectarian book,[161] a long line of State court decisions, cited in Appellees' briefs, have sustained the reading of the Bible in the public schools.[162]

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[160] Law and Contemporary Problems, Duke University School of Law, Vol. 14, No. 1 (1949), p. 67.

[161] **Vidal v. Girard Executors** (1844), 2 Howard 127, 11 L. Ed. 205, 235.

[162] Twelve states and the District of Columbia require Bible reading in the public schools. Twenty-five other states permit it. Only eight states have no Bible reading in the public schools. The State and Sectarian Education, N. E. A. Research Bulletin (Oct., 1946), p. 36; Stokes, Vol. II, p. 551. It is required by rule of the New York City Board of Education. Stokes, Vol. II, p. 553. Many of the states in which Bible reading in the schools is permitted, by court decision or rule of the education authorities, have no statute on the subject. No state has a statute specifically prohibiting public school Bible reading. Gavel, Public Funds for Church and Private Schools (Washington, 1937), p. 553; Stokes, Vol. II, p. 551. One state (Mississippi) has a constitutional provision to the effect that the Bible shall not be excluded from the public schools. Thorpe, Federal and State Constitutions, Vol. IV, p. 2092.

The few state court decisions which are adverse to Bible reading in the schools invo've compulsory Bible reading [163] or use of the Bible to impart sectarian instruction.[164] The fallacy in all of them is exemplified by *Ring v. Board of Education*, [165] which holds that the Bible is a sectarian book, but states that it would be impossible to lay down any rule "to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine." [166]

The Louisiana Court, in *Herald v. Parish Board*,[167] states that this is a "Godly land" and "we are a religious people," [168] that Catholic children are not prohibited by their church "from reading the Bible without authoritative comment," [169] that neither Catholic, Protestant or Jew can object to the reading of the Old Testament. The court also says that a Christian, either Catholic or Protestant, can have no objection to the repeating of the Lord's Prayer in the public schools. Nowhere in the opinion does the court say that a Jew can object to such repeating of that prayer, nor can it be successfully demonstrated that any one who believes in God can have any objection to that Prayer. As pointed out by the Court below (R. 35) that prayer is "based upon the ancient Jewish prayer called 'The Kaddish'—

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[163] **Finger v. Weedman** (South Dakota Sup. Ct., 1929), 226 N. W. 348; **Ring v. Bd. of Ed.** (1910), 245 Illinois 334, 92 N. E. 251.

[164] **Freeman v. Scheve**, 65 Neb. 853, 91 N. W. 846, 65 Neb. 876, 93 N. W. 169.

[165] 245 Illinois 394, 92 N. E. 251.

[166] The dissenting judges said: "To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect." 92 N. E. 258.

[167] 136 La. 1034, 68 So. 116.

[168] Id., p. 119.

[169] Id., p. 118.

'Exalted and hallowed be the name of God throughout the world * * * May His Kingdom come, His will be done.' "[170]

The Bible has been in the public schools from the earliest days of our history, and our Presidents and other public officials have frequently urged our citizens to read it.[171] The reading of the Bible and repeating of the Lord's Prayer in the opening exercises of the public schools does not "destroy or weaken or affect the cleavage between church and state"; it "does not bridge or conjoin the two."[172]

> "The Bible has long been in our common schools. * * * It was placed there as the book best adapted from which to 'teach children and youth the principles of piety, justice, and a sacred regard to truth, love to their country, humanity, and a universal benevolence, sobriety, moderation and temperance. * * *' But, in doing this, *no scholar is requested to believe it*, none to receive it as the only true version of the laws of God. *The teacher enters into no argument to prove its correctness, and gives no instruction in theology from it.* To read the Bible in school for these and like purposes,

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[170] "It is significant that at the great Congress of Religions at the World's Fair in Chicago, Christians, Jews, Mohammedans and other groups agreed to open their conferences with the Lord's Prayer." Stokes, Vol. II, p. 552.

[171] President Franklin D. Roosevelt's Thanksgiving Day Proclamation in 1944: "To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nation-wide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas. Let every man of every creed go to his own version of the Scriptures for a renewed and strengthening contact with those eternal truths and majestic principles which have inspired such measure of true greatness as this nation has achieved." N. Y. Times, Nov. 4, 1944; Stokes, Vol. II, p. 789.

[172] **Lewis v. Bd. of Ed.** (1935), 285 N. Y. Supp. 164, 174, modified in other respects in 286 N. Y. Supp. 174, rehearing denied in 288 N. Y. Supp. 751, appeal dismissed in 276 N. Y. 490, 12 N. E. 2d 172 (N. Y. Court of Appeals, 1937).

or to require it to be read without sectarian explanations, is no interference with religious liberty." [173]

## Point VI.

### Appellants' rights of conscience or freedom of intellect have not been infringed.

The First Amendment's prohibition against establishment of religion by Congress is not converted by the Fourteenth Amendment into a similar prohibition against State action except to prevent invasion of a citizen's religious liberty. Bible reading and the repeating of the Lord's Prayer in the public schools does not invade appellants' "liberty * * * without due process of law", within the meaning of the Fourteenth Amendment, unless it deprives them of a liberty which is "implicit in the concept of ordered liberty" or which is "of the very essence of a scheme of ordered liberty." [174]

The precise question involved is whether Bible reading and the repeating of the Lord's Prayer in the public schools is an establishment of religion of such a nature as to deprive appellants of freedom of religion or freedom of intellect. [175]

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[173] **Commonwealth, ex rel. Wall v. Cooke** (Mass., 1859), 7 Am. L. Reg. 417; **Lewis v. Bd. of Ed.** (1935), 285 N. Y. S. 164.

[174] **Adamson v. California** (1946), 332 U. S. 46, 54; **Palko v. Connecticut**, 302 U. S. 319, 325. "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration." **Wolf v. Colorado** (1948), 338 U. S. 25, 26.

[175] "Is that kind of double jeopardy to which the statute subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?" **Palko v. Connecticut** (1937), 302 U. S. 319, 328. Cf. Edward S. Corwin, Constitution of Powers in a Secular State, pp. 114 and 116.

The reasoning which leads to the answer to that question "starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states",[176] and it ends with the inevitable conclusion that Bible reading and the repeating of the Lord's Prayer in the public schools were not considered to be a violation of "the concept of ordered liberty", either before or at the time the First Amendment was made applicable to the states by the Fourteenth Amendment. In fact, Bible reading and the repeating of the Lord's Prayer in the public schools was then, long before, and is now, "firmly established in the consciousness of the nation."[177] The Fourteenth Amendment, "to the extent" that it made the First Amendment "binding upon the States,"[178] did not reflect "any principle then dominant in our national life" which would exclude Bible reading from the public schools. Bible reading in the public schools was then, and long before, "the whole experience of our people."[179]

Bible reading "from the very inception of this country has been an integral part of our school system" and "an integral part of the American tradition—a tradition which is now being threatened by a confused concept of religious liberty."[180]

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[176] **Adamson v. California**, 332 U. S. 46, 51.

[177] **McCollum v. Bd. of Ed.**, 333 U. S. 203, 217, 218.

[178] Id., p. 215. In the majority opinion, Mr. Justice Black says: "This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction **insofar** as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution." Id., pp. 204, 205.

[179] Id., p. 215. See discussion of Blaine Amendment and other matters at notes 143-173.

[180] Catholic Action (published by National Catholic Welfare Conference, Feb., 1950), Another Tradition at Stake, George Reed, p. 4, at 5. Mr. Reed says that this "action is brought by taxpayers supported by the United Secularist League of America." Id., p. 4.

The government of a heterogenous people must necessarily use tax money to promote opinions and practices which are contrary to the beliefs, disbeliefs, or convictions of part of the population. Some taxpayer can be found who disbelieves opinions which are promoted by almost every subject included in the program of any public school.

The objection of a small group to the reading of the Bible in the Public Schools is not unlike the objection to the effect that some teachers of social studies are guilty of anti-capitalist indoctrination, or the objection of certain religious groups to the teaching of scientific facts which they deem to be contrary to their religion, or the objection of Jehovah's Witnesses to compulsory salute of our flag as part of a school program to foster the principles of Americanism, or the teaching of many other things in our public schools which are disbelieved by some of the students and their parents or which are contrary to their convictions.

There is no evidence or allegation that the appellants' rights of conscience have been violated or that they have been deprived of the right of "free exercise" of their religion or that the rights of conscience of Gloria Klein, daughter of the appellant, Anne E. Klein, and a student in the Hawthorne High School, have been violated or that she has been deprived of the right of "free exercise" of her religion. There is no evidence or allegation to the effect that the reading of the Bible or reciting of the Lord's prayer in the school are contrary to their religion or that they do not believe in God or the Bible.

Secularists demand, in effect, that the public schools ignore the part that religion plays in the lives of the large majority of Americans. The positive or negative denial of the supernatural in the public schools would be a negation of religion and to make such denial is a unilateral exercise of liberty. To call a belief in the supernatural a religion,

and a belief in naturalism a philosophy, and, on that basis, to exclude the one and embrace the other, is to prohibit the free exercise of religion and to establish negative religious dogmatism. Negative religious dogmatism in the public schools is as truly a denial of liberty as is positive religious (sectarian) dogmatism.

Religious people have every right to resent and oppose such an attack upon their religion made in the name of dogmatic secularism. A failure of the public schools to acquaint our children with the role of religion in American culture, while at the same time teaching them all other phases of the culture, is to be unneutral. Secularists and atheists could seek no better means to convert the public schools wholly to their dogmatic secularism (views, beliefs and non-beliefs) than the total banishment of religion from the schools. If they accomplish that, conscience and equality will be the right solely of those who oppose religion in the schools, and the "establishment of religion" or "free exercise" of religion clauses of the First Amendment, or the "privileges or immunities" or "due process of law" or "equal protection" clauses of the Fourteenth Amendment will have been used to establish dogmatic secularism, irreligion or non-religion.

The First and Fourteenth Amendments prohibit the establishment of dogmatic secularism, irreligion, non-religion, atheism, and philosophy, as certainly as they prohibit the establishment of dogmatic religion (sectarian religion). They prohibit any interference with the free exercise of religion as surely as they prohibit any interference with the free exercise of secularism, irreligion, non-religion, atheism, and philosophy. Their prohibition against any laws which "compel" persons "to conform" their "beliefs" and "views" [181] to dogmatic secularism, irreligion, non-religion:

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[181] **Davis v. Beason**, 133 U. S. 333, 342.

atheism, and philosophy, is just as rigid as their prohibition against any laws which compel persons to conform their beliefs and views to dogmatic religion. Their command that no law shall "enforce an outward conformity to a prescribed standard"[182] set up by dogmatic secularism, irreligion, atheism, and philosophy, is not less strict than their command that no law shall enforce an outward conformity to a prescribed standard set up by dogmatic religion.

The "fixed star in our constitutional constellation * * * that no official, high or petty, can prescribe what shall be orthodox in" any "matters of opinion or force citizens to confess by word or act their faith therein"[183] is as applicable to dogmatic secularism, irreligion, non-religion, atheism, and philosophy, as it is to dogmatic (sectarian) religion.

A decision in favor of appellants would have to be predicated on the assumption that religious liberty has the same absolute quality as freedom to believe. Much confusion has arisen from the failure to distinguish "freedom of conscience" or "freedom of intellect or mind," from "religious liberty." Freedom of conscience, or freedom of intellect, is freedom to believe or disbelieve, and it is absolute. It cannot be restricted by law. The state cannot compel one to believe what he disbelieves or to disbelieve what he believes. On the other hand, religious liberty is freedom to act in accordance with one's belief or disbelief. It is not absolute, and it can be restricted by law.[184] It is relative, and its exercise is restricted by public welfare legislation

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[182] Id.

[183] **West Virginia State Bd. of Ed. v. Barnette**, 319 U. S. 624, 642.

[184] "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." **Cantwell v. Connecticut**, 310 U. S. 296, 303; **West Virginia State Bd. of Ed. v. Barnette**, 319 U. S. 624, 644; **Hamilton v. University of California**, 293 U. S. 245, 268.

and by the freedom of conscience or freedom of intellect of, and the equality of rights of, other citizens. A person has the right to believe in polygamy, but the First and Fourteenth Amendments do not prohibit a law forbidding him to practice it.[185]

Religious liberty, if it were absolute, would result in a denial of equality in the exercise of religious beliefs unless everyone had the same belief or acted uniformly. Equality in the exercise of religious beliefs, therefore, requires adjustment. Conscience and equality are not the right solely of any one group.

The New Jersey statute, as interpreted by the New Jersey Supreme Court and as applied by the Appellee Board of Education, contains no compulsive feature. No punishment or penalty is provided for, or has been imposed for non-compliance. In fact, any student may be excused upon request. Neither the statute or resolution force any student "to confess by word or act their faith," [186] in the Old Testament or the Lord's Prayer, and they do not "enforce an outward conformity to a prescribed standard." [187]

Permission granted to a pupil to be absent from the classroom during the reading of the Bible and the repeating of the Lord's Prayer is not, as contended by appellants,[188] an admission of discrimination. It is similar in every respect to an inauguration ceremony, pursuant to Article VI, Paragraph 3, of the Constitution, which provides for a religious inauguration ceremony but does not require it for those who desire to be excused from participation in a religious

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[185] **Davis v. Beason**, 133 U. S. 333, 342, 343; **Reynolds v. United States**, 98 U. S. 145, 165.

[186] **West Virginia State Bd. of Ed. v. Barnette**, 319 U. S. 624, 630.

[187] **Davis v. Beason**, 133 U. S. 333, 342.

[188] Appellants' Brief, p. 31.

ceremony. The provision for an oath of office, accompanied by the right to be excused, is not an admission of discrimination, and neither is the permitted withdrawal from Bible reading and the repeating of the Lord's prayer in the schools.

In *McCollum v. Board of Education*,[189] Mr. Justice Jackson says that the "plaintiff, as she has every right to be, is an avowed atheist." How is that right to be protected and secured to the atheist in the public schools, in connection with the reading of the Bible, the Declaration of Independence and the preamble to the New Jersey Constitution, and the singing of the Star Spangled Banner? When the school children sing the national anthem, they stand at attention and in an attitude not only of respect and love of our country but in an attitude of reverence for God, who has "made and preserved us a nation." The answer is that the rights of conscience, or freedom to disbelieve, of an atheist should be protected in the same manner as were the rights of conscience of the children of the plaintiffs in the flag salute case (*West Virginia State Board v. Barnette*).[190] In that case the Court did not declare unconstitutional the school board resolution providing for the salute to the flag. It merely enjoined the school board from compelling the plaintiff's children to salute the flag.

Mr. Justice Black's opinion in *McCollum v. Board of Education* [191] did not base jurisdiction of the Court or the decision of the Court upon discrimination against, or embarrassment or humiliation of, the appellant's child, who was not attending the sectarian classes when the action was commenced. That decision was based entirely upon an un-

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[189] 333 U. S. 203, 234.

[190] 319 U. S. 624.

[191] 333 U. S. 203.

constitutional utilization of the "public school system to aid *religious groups* to spread their faith" and "to aid any or all *religious faiths or sects* in the dissemination of their doctrines," and to afford "*sectarian groups* an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." [192] Mr. Justice Frankfurter, in his concurring opinion, agreed that "the Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious *sects*." Continuing he said that "Separation is a requirement to abstain from fusing functions of government and of religious *sects*."

The "divisiveness" theory exploited in the decisions of some of the state courts [193] should be given close scrutiny. That theory assumes that exercise of the right to be different puts a pupil in a class by himself, deprives him of equality with the other pupils, that he loses caste with his fellows and is liable to be regarded with aversion and subjected to reproach and insult. It assumes that intolerance pervades America and its public schools.

If we accept the theory exploited by those cases we would make the following evaluation of the divisiveness produced by the salute to the flag in the public schools: What can be more embarrassing to a school child, who believes the flag salute is a religious ceremony, than to have the other school children join in the salute to the flag when he refuses to do so, whether or not he stays in the room when the salute is given? In the language of the Louisiana case of *Herald v. Parish Board* [194] and the Illinois case of

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[192] Id., pp. 210, 211, 212.

[193] Cases cited in Appellants' Brief, pp. 30, 31.

[194] 68 So. 116, 121.

*Ring v. Board of Education*,[195] it "puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief." In the language of the Wisconsin case of *Weiss v. District Board*,[196] he "loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult."

But the evils prophesied by those three state courts have not been produced by the divisiveness which results from the salute to the flag in the schools, which divides Jehovah's Witnesses from the other children, or from inauguration oaths, which divide atheists from believers, or from the principle of separation of church and state, which divides large segments of sectarian school children from the children in the public schools. The evils prophesied have not resulted from the so-called divisiveness or separateness caused by those things for the reason that the right to be different is protected by the Constitution and is respected by the American people.

The aim of the National Conference of Christians and Jews is to eliminate any semblance of intolerance because of difference in religion. Keynoting its purpose with the words of the Late Chief Justice Hughes that "When we lose the right to be different, we lose the right to be free," it has upheld the right of men to differ in their beliefs, and has stood for something more than tolerance, namely, for a sympathetic understanding by each citizen of religious views different from his own.[197] Nonconformity to our views, or exercise of the right to be different, does not produce in Americans the type of consciousness of religious differences which causes intolerance, but a sympathetic understanding and respect for religious views of others.

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[195] 92 N. E. 251, 256.

[196] 44 N. W. 967, 975.

[197] Stokes, Vol. II, pp. 462, 463.

The vast majority of Americans are religious people, but they respect the right of an atheist to disbelieve, and have something more than mere tolerance for his views, namely, a sympathetic understanding of those views, but they do not concede to him the right to eliminate from our public schools everything which is inconsistent with those views.

Having as its basis the belief in God as our Creator, and the resulting corollary that if all men are children of God they must be brothers, the Judaeo-Christian tradition has been the most vital factor in America for promoting cohesion among a heterogenous democratic people. These are the foundations vital to our freedom exemplified in the Declaration of Independence and the Constitution. To that tradition Bible reading and the repeating of the Lord's Prayer in the public schools have contributed much. New Jersey should be permitted, and is permitted by the Constitution, to do everything in its power, consistent with absolute and complete neutrality toward sectarian religion,

## CONCLUSION.

to foster that tradition.

It is respectfully submitted that no principle of constitutional law is violated by the reading of the Old Testament, without comment, and the repeating of the Lord's Prayer in the opening exercises of public schools, and that the judgment of the court below should be affirmed.

Respectfully submitted,

ALBERT McCAY,

*Attorney for State Council of the Junior Order of United American Mechanics of the State of New Jersey, as amicus curiae.*